IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	
DENNIS K. CONLEY,	**Case No. 98-30339**
Debtor.	**MEMORANDUM OF DECISION AND ORDER**
GARY BISHOP and NORMA BISHOP, husband and wife, and CRAIG WHITTLESEY,	
Plaintiffs,	
vs.	**Adversary No. 98-6363**
DENNIS K. CONLEY, PATRICK W. CONLEY and MARGARET A. CONLEY, husband and wife, and EDMUNDO NATIVIDAD CERNA, ANTONIO NATIVIDAD CERNA, and JUAN NATIVIDAD CERNA,	
Defendants.	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Ronald J. Landeck, LANDECK, WESTBERG, JUDGE & GRAHAM, Moscow, Idaho, for Plaintiffs/Creditors Gary Bishop, Norma Bishop, and Craig Whittlesey.

Clinton J. Henderson, Clarkston, Washington, for Debtor/Defendant, Dennis K. Conley.

C. Barry Zimmerman, Coeur d'Alene, Idaho, chapter 13 Trustee.

INTRODUCTION

Dennis Conley ("Debtor") is a chapter 13 Debtor in Case No. 98-30339. Gary and Norma Bishop and Craig Whittlesey ("Creditors") are active participants in the chapter 13 proceeding. They also are the Plaintiffs in a separate adversary proceeding, No. 98-6363, against Debtor, his parents, and his in-laws.

Two legal issues are presented at this time for resolution through combined hearings and briefing in the chapter 13 case and adversary proceeding. These are, first, whether or not Creditors' judgment obtained in 1997 is violative of the injunction of § 524 arising from Debtor's prior chapter 7 bankruptcy and, second, whether or not the homestead of the Debtor is valid pursuant to Idaho law.

These parties have been in litigation for over a decade. Bringing two of many issues to resolution follows upon much activity in this chapter 13 case and in the related adversary proceeding. No one – certainly not the Court, and apparently not counsel or the litigants -- is under any misapprehension that resolving these two matters will bring all the litigation to a close, settle the long-standing disputes, or eliminate the enmity between the parties. Indeed, prior judicial decisions simply begat appeal and reinvigorated litigation.

But hope springs eternal.

The above described matters having been fully submitted, and the Court having evaluated the contentions of the parties, the following are the Court's findings of fact and conclusions of law. Fed.R.Bankr.P. 9014, 7052.[1]

BACKGROUND

A. Preliminary

Most of the facts relevant to the issues presently before the Court concern the course of litigation between these parties. A great deal of this information can be gleaned from reported decisions of this Court[2] and of the Idaho appellate courts.[3]

Debtor filed the present chapter 13 case on August 5, 1998. His residence at filing was an apartment in Moscow, Idaho. However, he claimed, on his schedule A, a fee interest in certain real property located on Moscow Mountain Road in Latah County, with an alleged value of $85,000. He claims a homestead exemption, Idaho Code § 55-1001 *et seq.*, in the Moscow Mountain property.

Creditors hold a lien against this property, Idaho Code § 10-1110, arising from the recording of a judgment on October 23, 1997. Debtor contends the lien fails because (a)

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[1] Since the present submissions are, in part, cast in terms of a request for partial summary judgment in the adversary proceeding, the Court notes there are essentially no relevant disputed factual issues. The parties argue primarily over the legal effect of undisputed facts.

[2] *In re Conley*, 99.1 I.B.C.R. 7 (Bankr. D. Idaho 1999); *In re Conley*, 95 I.B.C.R. 173, 1995 WL 366502 (Bankr. D. Idaho 1995); *In re Conley*, 159 B.R. 323, 93 I.B.C.R. 241 (Bankr. D. Idaho 1993).

[3] *Conley v. Whittlesey*, 126 Idaho 630, 888 P.2d 804 (Ct. App. 1995) (hereafter "*Conley I*"); *Conley v. Whittlesey*, ___ Idaho ___, 985 P.2d 1127,1999 WL 624378 (Idaho 1999) (hereafter "*Conley II*").

the judgment upon which it is premised was obtained in violation of the discharge injunction of § 524, or (b) because, if valid, it impairs his homestead exemption under § 522(f). Creditors dispute both propositions, and contend the exemption is invalid.

B. The property

The 25 acres on Moscow Mountain was originally obtained by Debtor through a contract for deed. That deed was subject to an easement across Creditors' property in order to reach Debtor's property.

In 1989, Debtor transferred title to the property by warranty deed to an entity controlled by his parents known as the "Nivek Family Trust No. 3." This was done allegedly as a means of providing security for money his parents lent to him. This entity then reconveyed the property to Debtor in July 1992 by bargain and sale deed, and Debtor simultaneously granted a mortgage to his parents, Pat and Margaret Conley, which was recorded July 22, 1992. The original amount of this debt was $60,750.

Debtor also schedules a secured claim on the property owed to his wife's relatives, Edmundo Cerna, et al, based upon a note in the principal amount of $29,500 and a mortgage recorded on October 16, 1996.[4]

C. Initial easement litigation

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[4] The Conleys and Cernas have filed proofs of claim in the chapter 13 case, alleging debts as of the date of the petition for relief of $86,265.00 and $36,040.00, respectively.

In 1988, litigation commenced over the extent of the easement, and it has continued virtually uninterrupted since. In 1989, Debtor's lawyer had agreed to a settlement on the record at the time scheduled for trial. But Debtor refused to sign the written version of that agreement. The state court concluded Debtor was unreasonably recalcitrant and ordered the agreement signed. The court also found Debtor in contempt and liable for attorney's fees. *See*, 126 Idaho at 632-33, 888 P.2d at 806-07. A judgment was entered against Debtor in November 1992 for $18,291.80. Creditors recorded this judgment in the Latah County real property records. Debtor appealed.

D. The first bankruptcy, *Conley I*, and remand

While he was appealing this ruling of the state court, Debtor also filed on April 1, 1993, his chapter 7 bankruptcy petition, case no. 93-00922. Just prior to that filing, Debtor recorded on March 25, 1993, a declaration of homestead on the Moscow Mountain property. *See*, 95 I.B.C.R. at 173-74. Discharge of Debtor was entered in that case on August 10, 1993.

On January 24, 1995, the Idaho Court of Appeals in *Conley I* affirmed the lower court's findings of contempt, but reversed in regard to that court's approach to enforcing the parties' settlement. Upon remand, Debtor asked for and obtained an order setting aside the $18,291.80 judgment of Creditors.[5]

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[5] The Court of Appeals had reversed the August 1991 order holding that the parties' 1989 settlement was binding. Debtor did not appeal, and the appellate court did not set aside, the November 1992 order awarding the $18,291.80. However, the district court in June 1995 set aside the monetary order on a Rule 60(b) analysis flowing from Debtor's "bill of *quia timet.*" The court, however, in the concluding line of this June 1995 decision expressly noted that setting aside the award was without prejudice to Creditors seeking costs (continued...)

E. Trial after remand (easement issues)

A bench trial commenced in October 1995 on the easement issues. Debtor lost this round of litigation as well. The court entered a July 1996 "Order and Permanent Injunction" establishing the parameters of the easement, and an injunction against Debtor prohibiting the use of the easement in excess of those parameters. Debtor was also ordered to surface the driving portion of the easement by November 1996 or he would be enjoined from using it until it was done. *See*, 985 P.2d at 1130, 1999 WL 624378 at *2.

F. Trial on damages

The second phase of the trial took place in the fall of 1996. Creditors again prevailed, obtaining from the District Court of the Second Judicial District of the State of Idaho three rulings:

(A). "Judgment and Order Partially Staying Execution" (July 22, 1997).[6]

This judgment awarded Bishop $17,874.86 against Debtor, plus interest at 18% from October 10, 1986, characterized as "trespass" damages for the hewing of a cedar tree. It awarded Creditors collectively damages of $1,095.75, plus interest at 10.875% as damages for other tree cutting.

It also awarded Creditors collectively damages of $25,000.00 for Debtor's failure to repair, improve and maintain the right of way under the easement. The court however

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[5](...continued)
and fees at a later date including the $18,000 in fees addressed in the order which it was vacating.

[6] This judgment expressly incorporated by reference the July 25, 1996 "Order and Permanent Injunction."

stayed execution on this $25,000 award until September 16, 1997, and ordered that the same would be deleted if Debtor remedied that failure. This judgment was recorded in the real property records of Latah County on October 23, 1997.

B. "Order Lifting Stay of Execution" (October 28, 1997).

By this order the court found that Debtor had failed to comply with the requirements of repair and maintenance of the right of way, as set forth in the July 1997 judgment and the order/injunction of July 1996. It therefore lifted the stay of execution on the $25,000.00 component of the July 1997 judgment. This order was recorded in the real property records on October 30, 1997.

C. "Order re: Costs and Attorneys Fees" (June 8, 1998).

This order awarded Creditors $68,373.00 in attorneys' fees and $3,569.78 in costs ($71,942.78). The order recites that this award was to be added to the damages awarded under the judgment of July 1997 and order of October 1997.[7]

All told, the Judgment awards Creditors $115,913.39 in damages, costs and fees. Creditors assert that accrual of interest under the Judgment brings the total to $157,006.12 as of the date of the filing of the chapter 13 case.[8]

Debtor appealed these rulings as well.

G. Post-litigation declaration

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[7] These three rulings are hereafter collectively referred to as "the Judgment."

[8] This amount is set forth on Creditors' proof of claim filed herein. Pursuant to Fed.R.Bankr.P. 3001(f), such claim is at this time prima facie evidence of validity and amount.

On March 18, 1997, after the order and injunction of July 1996 had been entered but before the Judgment had been entered or recorded, Debtor filed under Idaho Code § 55-1006, a "declaration of nonabandonment" of the homestead on the Moscow Mountain property.

H. Second bankruptcy filing

The second and current bankruptcy proceeding was filed on August 5, 1998, after the last of the state court orders and judgments had been entered and recorded, and not long after Creditors had caused a writ of execution to be issued. The appeal proceeded notwithstanding the bankruptcy.

This chapter 13 case remains in an unconfirmed posture, likely an unavoidable result given the magnitude and nature of the litigation which preceded the filing and that which has ensued since.

Creditors have objected to confirmation on multiple grounds. The Trustee has also raised numerous concerns with confirmation. These matters have been heard and continued several times and await rescheduled hearing once the present issues have been resolved.[9]

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[9] The Court has previously ruled on one issue related to the present matters: the question of Creditors' ability to attack the validity of the homestead notwithstanding the fact that they failed to file a timely objection under Fed.R.Bankr.P. 4003 to Debtor's schedule C claiming the exemption. That issue was resolved by this Court's decision of January 11, 1999, *In re Conley*, 99 .1 I.B.C.R. 7 (Bankr. D. Idaho, 1999), which allowed Creditors the right to contest the homestead, but only in the context of Debtor's § 522(f) motion.

At a March pretrial conference in the adversary proceeding,[10] the parties agreed to file cross motions for partial summary judgment on the two issues identified at the start of this decision: (1) the validity of Creditors' 1997 Judgment in light of the Debtor's prior 1993 bankruptcy, and (2) the validity of the Debtor's claimed homestead exemption.[11]

The parties have agreed that all submissions made will be considered in both the adversary proceeding and in the chapter 13 case, and that rulings will have preclusive effect in both proceedings so as to avoid unnecessary duplication in the presentation of evidence and argument.

I. Decision in *Conley II*

On August 12, 1999, the Idaho Supreme Court in *Conley II* affirmed the entirety of the trial court's Judgment regarding the parameters of the easement,

requiring restoration of the property before continued use of the easement and enjoining Debtor's use until that condition was met, and sustained all awards to Creditors for damages, attorneys' fees and costs.

ISSUES

A. Whether the Judgment violates § 524 and is void.

B. Whether the Debtor's homestead exemption is valid.

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[10] The adversary proceeding is, primarily, an action seeking equitable subordination of the consensual secured interests granted Debtor's parents and in-laws.

[11] The parties also agreed that Debtor would be deposed, but solely in regard to these issues. This deposition occurred on April 7, 1999, and the transcript lodged for consideration under the present motions.

DISCUSSION

A. <u>Section 524 issues</u>

1. What claims were discharged?

Creditors were scheduled in, and given notice of, Debtor's chapter 7 case in April 1993. While at the time of this bankruptcy, the only adjudicated monetary liability of Debtor to Creditors was in regard to the $18,291.80 in fees for the contempt of the 1992 enforcement order, this was not the total extent of the "claims" of Creditors subject to the bankruptcy.

Claim is defined in § 101(5):

(5) "claim" means –

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to
>
> in equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.][12]

Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d 525 (9th Cir. 1998) addressed this provision,[13] noting that "[t]his 'broadest possible definition' of 'claim' is designed to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.' " 143 F.3d at 532, citing

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[12] A debt, pursuant to § 101(12), is simply liability on a claim; the terms debt and claim are co-extensive. *Daghighfekr v. Mekhail (In re Daghighfekr)*, 161 B.R. 685, 687 (9th Cir. BAP 1993).

[13] Other ramifications of *Siegel* will be addressed below.

California Dep't of Health Services v. Jensen (In re Jensen), 995 F.2d 925, 929 (9th Cir. 1993) quoting H.R.Rep. No. 95- 595, at 309 (1978); S.Rep. No. 95-598, at 22 (1978) (alteration in original).

Lawrence Tractor Co., v. Gregory (Matter of Gregory), 705 F.2d 1118, 1123 (9th Cir. 1983) held that, once a creditor receives notice of the pendency of a bankruptcy, it is bound to inquire as to the extent of any claim it may have, and to raise any objection to discharge that it might have. Contrary to the contentions of Creditors, *Gregory* and *Siegel* make clear that the manner in which a debtor schedules a claim is not limiting.

There was no litigation in the first of Debtor's bankruptcies as to the extent of Creditors' claims. While there was litigation seeking to avoid Creditors' judgment lien under § 522(f), Debtor lost that litigation by virtue of this Court's 1995 ruling. 95 I.B.C.R. 173.[14]

Discharge was entered in the chapter 7 proceeding on August 8, 1993. Section 524(a)(1) provides that:

> (a) A discharge in a case under this title --
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived[.]

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[14] Upholding Creditors' 1992 lien against the original § 522(f) attack is now of little significance. While the $18,291.80 lien survived the first bankruptcy, the judgment itself was vacated by the state district court following remand under *Conley I*. That judgment lien no longer exists.

Thus, the Debtor's chapter 7 bankruptcy of 1993 would capture and discharge all claims of the Creditors arising prior to April 1, 1993, whether or not at that point liquidated, contingent or disputed. That discharge would void any judgment, even if later obtained, to the extent it establishes a personal liability of Debtor with respect to discharged claims. § 524(a)(1). *In re Pavelich*, 229 B.R. 777, 781 (9th Cir. BAP 1999).

2. The relation of continued litigation to the contingent claims.

Debtor, however, continued throughout the pendency of his first bankruptcy to pursue his appeal. The record establishes that the Idaho Court of Appeals stayed consideration of the appeal pending bankruptcy, but again commenced its deliberations on the matter once the bankruptcy had been concluded. It seems that Debtor and Creditors as litigants, and thus the state courts, dealt with the bankruptcy as but an interruption to the ultimate resolution of the litigation over the easement and all claims related thereto. This continuation of the litigation by Debtor, notwithstanding his earlier chapter 7, is key to the present dispute.

Debtor's present argument is that Creditors' Judgment is violative of discharge because it awarded damages for injuries suffered by Creditors prior to the April 1, 1993 effective date of the earlier bankruptcy. Yet, while Debtor contends Creditors are thus barred from recovering through the state court process for pre-1993 injuries they suffered, he apparently sees no problem with his continuation and use of the same litigation in order that he might achieve affirmative relief related to his claims and contentions regarding the easement. This sort of "heads, I win; tails, you lose" approach was also addressed in *Siegel*.

The debtor in *Siegel* sought to include within the scope of his discharge attorneys' fees which were awarded his mortgagee in post-bankruptcy litigation prosecuted by the debtor. The debtor argued that such fees had to be considered a "contingent claim" and thus subject to discharge because they arose under the same contract which was at issue in the bankruptcy. The Court stated:

> Siegel asks us to read those principles [regarding contingent claims] in an unreflective way, and to decide that the attorney's fee provision was contingent because it could not take effect unless Siegel did something. No doubt the future is always contingent, but that does not mean that a bankrupt is discharged regarding everything he might do in the future. None of our authorities are to the contrary. Not surprisingly, an unreflective reading is the wrong reading.

143 F.3d at 532. While the Court recognized the appropriateness of eliminating contingent liability of a debtor, as an integral part of his fresh start, it held:

> This is a case where the debtor, Siegel, had been freed from the untoward effects of contracts he had entered into. Freddie Mac could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same weapon to be used against him.
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> . . .
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> In fine, Siegel's decision to pursue a whole new course of litigation made him subject to the strictures of the attorney's fee provision. In other words, while his bankruptcy did protect him from the results of his past acts, including attorney's fees associated with those acts, it did not give him carte blanche to go out and commence new litigation about the contract without consequences. Thus, we affirm the district court's award of attorney's fees in favor of Freddie Mac.
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> . . .
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> Not entirely unlike Dr. Pangloss, Siegel thought that for him this was the best of all possible worlds. He thought he could use

> bankruptcy to discharge all of his obligations under his contracts with Freddie Mac and still personally retain all of his rights arising out of those contracts. That picture of the world was a mere eidolon. Any claims Siegel might have had against Freddie Mac came to an end when its claim in Siegel's bankruptcy went unchallenged and became recognized. And any right to avoid the attorney's fee provision of his contract fell short of protecting him when he voluntarily undertook this post-bankruptcy action against Freddie Mac.

143 F.3d at 533-34 (footnote omitted).

The Court concludes that -- ordinarily -- the first bankruptcy would operate to bring within the § 524 discharge all "claims" of Creditors, including contingent and unliquidated claims, existing as of April 1993. These claims clearly include, under § 101(5), the "trespass" damage claims for the cedar and other trees Debtor chopped down in 1986 and 1988; the interest ascribed by the state court to those injuries through April 1, 1993; any claim for damages for injury to the servient estate prior to 1993; and costs and fees related to those claims. It would also reach any other disputed, contingent or unliquidated claim.

However, this is not the "ordinary" case. In light of *Siegel*, the discharge is not effective to fully insulate Debtor from the consequences of his own actions after the first bankruptcy was filed. For that reason, the components of the Judgment must be separately analyzed.

a. "Trespass" prior to 1993.

The Court concludes the damages for the severing of the trees in 1986 and 1988 are so clearly tied to prepetition events, that they are claims discharged by the first bankruptcy. Both Debtor and Creditors should have realized that these claims would be subject to the 1993 bankruptcy process. The interest accrued on those damages must also fall subject to the discharge.

b. "Restoration" damages.

The Court must conclude that the $25,000 "restoration" damage suffers the same fate as the "trespass" damages. That award has its genesis in significant part in the court's finding of damage to Creditors' property from Debtor's pre-1993 conduct.

There is an injunctive aspect to the money judgment. The court abated this award and provided Debtor an opportunity to comply with the injunctive requirements of its orders. And *Conley II* affirmed the court's use of this monetary adjunct to its enforcement of Debtor's obligations under the easement.

Still, the Court concludes that the $25,000 figure is primarily an award of damages to compensate Creditors for the injuries to their property resulting from Debtor's conduct prior to 1993. It is therefore discharged.

c. Injunctive rulings.

The scope of Debtor's duties and burdens under the easement was a major component of the litigation before and after the 1993 bankruptcy. Debtor was found by the state court to have grossly exceeded his legitimate rights under the easement, and that several conditions were to be met before he could again use it. *Conley II* rejected each of Debtor's attacks on these rulings. While the "damage" award of $25,000 falls prey to the discharge, this Court believes the balance of the injunctive aspects of the state court rulings survive, and bind Debtor to the extent he wishes to ever again use the easement.

Pavelich states, 229 B.R. at 782, that "a federal court need not give full faith and credit to state court judgments **to the extent** that they are void under § 524(a)(1)." (Emphasis supplied.) As stated in § 524(a)(1), quoted above, the judgment is void "to the extent that such judgment is a determination of **personal liability** . . . ." (Emphasis supplied.) Thus, to the extent such a judgment is not void as a determination of personal liability with respect to a discharged debt, it is entitled to respect and full faith and credit.[15]

If Debtor attempts to use the easement, he must comply with all conditions and requirements on use imposed by the state court. This will include the expenditure of whatever funds are needed (whether $25,000, or more, or less[16]) to fully comply with the road surfacing and related remediation required. That provision is not an award of damages; it is a condition properly imposed on the future exercise of rights under the easement.

Similarly, Debtor will be bound by the Order and Permanent Injunction of 1996, and required to honor the parameters of the easement, as established by the state court. *See, Conley II,* 985 P.2d 1127, 1135, 1999 WL 624378 at *7-8 (upholding injunction).

The state court's articulation of the duties and obligations imposed on Debtor regarding the easement followed exhaustive litigation and thorough analysis. Judge Bengston's rulings were fully and unambiguously affirmed in *Conley II*. This Court sees

[15] *Accord, Elsaesser v. Raeon (In re Goldberg),* 235 B.R. 476, 480-81, 99.2 I.B.C.R. 62, 64 (Bankr. D. Idaho 1999) (discussing full faith and credit.)

[16] $25,000 may or may not be an accurate gauge of what remediation would today cost should Debtor seek to comply with the injunction and again use the easement.

those rulings as well within the jurisdiction of the state courts, and the analyses of the trial and appellate courts are persuasive. Even if they were not, they are

entitled to full faith and credit except to the limited extent that they might run afoul of the discharge, as discussed above.

Debtor's interests in the Moscow Mountain property are subject to all restrictions and conditions on use imposed by the state court. Neither the first bankruptcy, nor this one, alter that fact.

d. Attorneys' fees and costs.

A significant portion of the Judgment reflects the court's award of attorneys' fees and costs to Creditors. Debtor argues that any fees or costs incurred in attempting to establish claims which are dischargeable (such as the hewing of the cedar tree and similar trespass) should likewise be held discharged, regardless of the date the services were provided. For example, fees incurred in 1997 by Creditors in establishing the trespass damages for pre-1993 conduct would be, under Debtor's view, subject to discharge.

Siegel belies this approach, and so do the equities here. Were it not for Debtor's continued litigation, the fees of Creditors on these "dischargeable" claims would not have been incurred.

Debtor gave life to the post-bankruptcy litigation. He sought to relitigate the enforcement conditions on the easement. He asserted damage claims, as well as defended them. Debtor said nothing of his reliance on the earlier discharge when the parties litigated Creditors' damage claims at length in the renewed state court matter.[17]

For these reasons, and consistent with *Siegel*, Debtor assumed the risk that continued litigation would be resolved adversely to him, and his opponents awarded fees and costs.

The Court concludes, under the totality of the circumstances reflected by the record, that the fees and costs of $71,942.78 awarded Creditors by the state court (and affirmed on appeal) should be parsed into those subject to the discharge and those which are not solely by reference to the date the services were rendered. All costs incurred and fees charged for services actually rendered before April 1, 1993 are discharged. All fees for services rendered, and costs incurred, from and after April 1, 1993, regardless of the legal or factual issue addressed, remain valid.

In order to reach a base amount of nondischarged fees and costs under this approach, the Court has reviewed in detail the submissions in the state court as well as what has been presented and argued here. It appears to the Court that Creditors withdrew, in their state court fee request, all pre-April 1, 1993 fees and costs. Their reduction matched the amounts Debtor contested, in his objection and the spreadsheet analysis appended thereto, on the basis that they were subject to the discharge. The amount awarded by the state court, $71,942.78, is accurate under this Court's

[17] Creditors assert, without contradiction, that the issue of bankruptcy discharge was not raised by Debtor until the substantive claims had all been resolved against him, and the court commenced its post-trial consideration of awarding fees and costs to Creditors. The state court pleadings which this Court has been provided bear out the assertion.

methodology, and that amount is not subject to the discharge in the first bankruptcy. The lien of Creditors is valid to the extent of $71,942.78. Interest on this amount accrued prior to the chapter 13 petition date is also part of the claim.[18]

3. The estoppel argument

A related issue should be addressed. Creditors have suggested that Debtor should be estopped from asserting the first bankruptcy's discharge as against any and all components of the 1997 Judgment and judgment lien, because he failed to raise the contention during the litigation after remand under *Conley I*.[19] They contend that the bankruptcy discharge was an affirmative defense[20] to the Creditors' claims in the continued state court litigation, but one Debtor never asserted until well into the post-trial stage in August 1997 in response to Creditors' fee request.

This is an appealing argument. There has been no good and persuasive reason offered to justify Debtor's silence and belated assertion of the discharge as a defense. However, *Pavelich*, 229 B.R. at 781-82, indicates that a Debtor need not assert the discharge injunction as an affirmative defense in order to later pursue the

[18] The Court has not attempted to calculate this amount; Creditors can file an amended proof of claim reflecting its calculation.

[19] Given the Court's conclusion, *supra*, regarding the state court's award of costs and fees, this estoppel argument now affects only the damage and restoration claims, and interest thereupon.

[20] Idaho Rule Civil Procedure 8(c) includes "discharge in bankruptcy" as an affirmative defense.

argument that the judgment is void under § 524. Thus, the argument is ineffective to insulate the damage, interest and restoration awards from the impact of the discharge.

Even so, the conduct of Debtor in failing to raise the question of the discharge until after the trial was concluded and the court's initial June 1997 judgment entered does provide an element of estoppel because, in the Court's view, it adds support to the conclusion, reached under *Siegel*, that the fees and costs Creditors incurred and were awarded resulted from Debtor's post-bankruptcy conduct and are not subject to discharge as "contingent" claims. Debtor might have avoided exposure for some of these significant fees if he had asserted the bankruptcy discharge before trial, and not belatedly.

Therefore, the Court finds and concludes, in regard to Debtor's contentions under § 524, that the Judgment and judgment lien of Creditors is valid to the extent of the fees and costs of $71,942.78 which were awarded, and interest accrued thereupon, but that the balance of the state court's monetary award is subject to the August 8, 1993 discharge and § 524. Further, the Court expressly finds and concludes that all injunctive aspects of the state court's rulings, including all limitations or conditions on Debtor's future use of the easement, are not affected by the discharge.

B. <u>The homestead issues</u>

Since there is a portion of the Judgment lien which is valid and enforceable notwithstanding § 524, the issues regarding judgment lien avoidance under § 522(f)(1)(A) remain. The Court must now proceed to a consideration of the second question submitted -- the validity of Debtor's homestead exemption -- because a valid exemption is prerequisite to any avoidance of Creditors' judgment lien as an impairment of exemption under § 522(f). Numerous issues have been raised by Creditors regarding the bona fides of Debtor's asserted homestead on Moscow Mountain.

The chronology relevant to this issue reflects: Debtor first occupied the property in 1986; the last "occupation" of the property by Debtor was in 1991; the first declaration of homestead was March 25, 1993; the chapter 7 bankruptcy filing was April 1, 1993; the declaration of nonabandonment was filed March 18, 1997; the first date of recordation of Creditors' Judgment was October 23, 1997; and the chapter 13 bankruptcy was filed August 5, 1998.

1. The prior 1995 determinations and *res judicata*

Debtor insists that Judge Hagan's 1995 determination that the Debtor had a valid homestead exemption in the chapter 7 case, 95 I.B.C.R. 173, is entitled to preclusive effect under the principles of *res judicata*. The Court does not entirely agree.

Res judicata requires that the identical issue was previously tried between the same parties or their privities. Here, the parties and the issue of validity of homestead are the same, but the context of the issue, and the facts relevant to its determination, are not identical.

Exemptions are determined as of the date of the filing of the petition for relief. *In re Parks,* 96.2 I.B.C.R. 64, 65 (Bankr. D. Idaho 1996). In the case of *seriatim* bankruptcy filings, the operative facts on the respective petition dates may well be different.

Judge Hagan's 1995 determination was based upon the facts as of the date of the filing of the chapter 7 petition in April 1993. At that point, Debtor had filed a declaration of homestead on March 25, 1993. The first judgment lien of Creditors had attached after the automatic homestead exemption had lapsed, but before the declaration of homestead was filed. Judge Hagan thus held the lien valid and unavoidable under § 522(f).[21] 95 I.B.C.R. at 174-75.[22]

This Court must consider the facts as they existed on August 5, 1998, and apply the current law thereto.

2. Automatic and declared homesteads under Idaho law

Creditors contend any valid homestead Debtor held has, since the first bankruptcy, been lost. A brief recap of Idaho law on the subject will assist in understanding the Court's disposition of those contentions.

This Court has previously summarized the application of Idaho's homestead statutes as follows:

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[21] As noted previously, this lien was later vacated by the state court following *Conley I*, and it no longer exists.

[22] The Court's 1995 decision discussed changes in applicable law occasioned by amendments to § 522(f), even though those changes did not apply to that case. *Id.*

> A homestead is defined, in pertinent part, as "unimproved land owned with the intention of placing a house or mobile home thereon and residing thereon." I.C. § 55-1001(2). "Owner" includes, but is not limited to, a purchaser under a deed of trust, mortgage, or contract. I.C. § 55-1001(4). In Idaho, the property upon which a person resides constitutes a homestead and is automatically protected. I.C. § 55-1004(1). However, if unimproved land is selected for a homestead, a declaration of homestead must be recorded in the county records where the property is located and property upon which the declarant resides must be abandoned as a homestead. I.C. § 55-1004(2). A homestead is subject to execution and forced sale in satisfaction of judgments obtained "before the homestead was in effect, and which constitute liens upon the premises." I.C. § 55-1005(1).

In re Blankenship, 98.1 I.B.C.R. 19 (Bankr. D. Idaho 1998).[23]

In the present situation, the Court also benefits from Judge Hagan's analysis of both Idaho law, and the specific facts involving this same Moscow Mountain property, in Debtor's prior case:

> Under Idaho law, there are two ways to create a homestead. The first is to live on the claimed property. *See* Idaho Code §§ 55-1001 and 55-1004(1). If the claimant ceases to live on the property for a period of six months, the homestead is presumed to be abandoned unless the claimant files a notice of non-abandonment within six months of vacating the property. Here, although the debtor arguably had an automatic homestead in the property, the debtor subsequently abandoned the property for well over six months.
>
> The second way to create a homestead exemption is to file a declaration of homestead. *See*, 55-1004(2). This method may be used by an owner who is not living on the property. On March 25, 1993, the debtor filed a declaration of homestead on the property. The lien creditors' judgment lien attached after the automatic homestead lapsed, but before the declared homestead took effect.

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[23] In that case, the debtor recorded a statutorily correct declaration of homestead on vacant land he was purchasing, but on which he did not yet reside. The Court validated his homestead as of the date of recording the declaration. *Id.*

95 I.B.C.R. at 174. The Court, then, has recognized that any automatic homestead of this Debtor long ago lapsed,[24] and that his homestead depends upon the March 1993 declaration.

Creditors attack the homestead on several theories. Assuming without deciding that collateral estoppel principles (as opposed to *res judicata*) allow these new assaults, the Court is ultimately unpersuaded.

3. Abandonment and nonabandonment

Creditors assert Debtor is presumed to have abandoned the 1993 declared homestead under Idaho Code § 55-1006. Notwithstanding the extended absence of Debtor from the property, the Court disagrees.

If a debtor avails himself of an automatic homestead by virtue of residing on property, and if he is going to be absent from that homestead for more than six months but does not intend to abandon it, a declaration of nonabandonment must be filed to preserve the exemption. § 55-1006. If no such declaration is filed, there is a rebuttable presumption that the exemption is lost. *In re Koopal*, 226 B.R. 888, 891, 98.4 I.B.C.R. 98, 99 (Bankr. D. Idaho 1998); *In re Cavanaugh*, 175 B.R. 369, 372, 94 I.B.C.R. 219, 220 (Bankr. D. Idaho 1994).

The filing of the declaration of nonabandonment is an act similar in function of the filing of a declaration of homestead on unoccupied property. That is, both provide notice of a debtor's assertion and claim of entitlement to the benefits of the homestead exemption on property which is not presently occupied by the debtor as a home.

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[24] The last occupancy by the Debtor was in 1991.

The Court finds it reasonable to construe the six-month presumption of Idaho Code § 55-1006 as applying only to automatic homesteads arising under § 55-1004(1) by virtue of a debtor's occupation. Absence from the property is of no consequence unless the debtor has previously been present on the property and used that presence as a means of establishing the exemption. Indeed, § 55-1006 states "[a] homestead is presumed abandoned if the owner **vacates the property** for a continuous period of at least six (6) months." (Emphasis supplied.) Vacation is a *non sequitur* without prior presence and occupation.

The Idaho Code does not reflect that, once a homestead has been claimed on unimproved property by a declaration filed under § 55-1004(2), this claim of exemption is later ever lost, (unless there is a recission of that election by the debtor in order to assert a different homestead, which election must be reflected in an express abandonment.) Idaho Code § 55-1004(2), (4). There is nothing equivalent to the six-month absence, relevant to automatic homesteads, which requires any sort of nonabandonment declaration as to undeveloped property which has previously been expressly claimed as an intended homestead.[25]

Section 55-1006 is inapplicable to the present situation.

4. The declarations of Debtor

[25] Creditors also argue that Debtor has had other residences in Moscow since 1991, sufficient for the Court to find an abandonment or recission of the exemption on Moscow Mountain in favor of a new homestead. The Court disagrees since the newer residences (e.g., rented apartments) are not ones in which the Debtor could conceivably claim a homestead.

The Latah County real property records reflect (a) a declaration of the unoccupied property as a homestead filed on March 25, 1993, and (b) a declaration of nonabandonment of that homestead filed March 18, 1997.

This Court validated Debtor's homestead exemption in 1995, 95 I.B.C.R. at 173, based on the March 1993 declaration of homestead on undeveloped property under Idaho Code § 55-1004(2). This Court today agrees that Debtor has a valid homestead exemption in the Moscow Mountain property. This need not flow from the alleged *res judicata* or collateral estoppel effect of earlier litigation but rather derives from the documents of record and the provisions of the Idaho Code.

The declaration made in March 1993 is as valid today as it was when Judge Hagan ruled in 1995, unless it has been lost for some reason. As noted, Creditors have not persuaded the Court that such a reason exists under Idaho law.

What is the effect of Debtor's March 1997 declaration of nonabandonment? The Court concludes that it had none. Since physical presence on or absence from undeveloped property is immaterial to a homestead claimed by declaration under Idaho Code § 55-1004(2), there was no risk of implied abandonment, and no need for the declaration of nonabandonment.[26] Debtor was not required to "redeclare" the same prior to the chapter 13 filing. That he did so is irrelevant.

The judgment lien of Creditors recorded on October 1997[27] was subsequent to the exemption of Debtor based on the 1993 declaration.

5. Subjective and objective intent

There is little doubt that Debtor in many ways has manifested a subjective intention to claim Moscow Mountain as his homestead. The constancy of litigation for well over a decade and the significant legal expense incurred by both sides is testament to this intention.

Nevertheless, Debtor long ago was effectively removed from access to this property. It is clear that significant impediments, including financial ones, stand in the way of Debtor ever occupying the property. Creditors assert that the injunctive aspects of the state court rulings, and Debtor's other circumstances and financial limitations, make it a practical impossibility for Debtor to ever again reside on the property. Creditors argue

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[26] Assume, *arguendo*, that Debtor's March 1997 declaration of nonabandonment was, in intent and effect, a renewed declaration of homestead on unoccupied property under Idaho Code § 55-1004(2). Just as in Judge Hagan's analysis in *Blankenship* and in Debtor's prior case, 95 I.B.C.R. at 173, the prebankruptcy filing of such declaration on unoccupied property would be effective as to interests arising after recording of the declaration. § 55-1005(1). Here the 1997 judgment of Creditors did not become a lien under Idaho Code § 10-1110 until October 23, 1997, several months after the March 1997 filing of Debtor's second declaration.

[27] The Court has assumed for argument that the October 1997 order and June 1998 order relate back to the original judgment, and benefit from its recording date. But the first recording occurred on October 23, 1997, and the relation back of the supplementary rulings of the state court is of no consequence to the issue presented, since nothing has been shown which would allow the October 1997 judgment lien to relate back to a date preceding Debtor's March 1997 declaration, much less the March 1993 declaration.

that Debtor therefore cannot have a bona fide "objective" intention to occupy the property, and his declaration is thus insufficient to impress the property with the exemption.

Proof of an ability to presently or at some future point actually occupy the property is not part of the requirements for homestead by declaration under § 55-1004(2) and (3), or case law construing those provisions. Creditors can point only to § 55-1001(2) which defines homestead, in pertinent part, as "unimproved land owned **with the intention of placing a house or mobile home thereon and residing thereon**." (Emphasis supplied.)

The Court has been provided no authority establishing that, through this definition or otherwise, limitations on a debtor's ability to occupy are relevant or applicable to a debtor's intent to occupy. Creditors provide no statutory or case law basis to support restrictions as to the time within which a debtor's intention must ripen to actual occupancy, or to require proof of financial ability to occupy.

The record clearly raises a factual question as to whether Debtor can reasonably expect to occupy the property. In addition to the financial issues evidenced by the bankruptcy, and the injunctive requirements he faces, Debtor's deposition is replete with discussion of several practical difficulties faced. They may well be insurmountable. Nevertheless, the Court is unpersuaded that a debtor's subjective intention to occupy property must pass through some undefined crucible of objective capability – temporal, financial or otherwise – in order to be valid.

The statute requires only that, in addition to an intent to reside, the debtor own or be purchasing the property and, thus, have a present interest in such property. There are no guideposts for courts or litigants if conditions are to be imposed on the intent requirement. (For example, how certain must a debtor's financial capacity be? How soon must the intention to reside ripen into occupancy? And imposing additional conditions, not found in the statute, runs afoul of the accepted principle that exemption provisions are to be construed liberally in favor of debtors.

The Court concludes that the exemption is valid as against Creditors' attack.[28]

C. <u>Lien avoidance under Section 522(f)</u>[29]

The homestead exemption is valid. It was asserted in compliance with Idaho Code § 55-1004(2). It has not been abandoned or lost. Is the lien, which has been found valid to the extent of $71,942.78 plus prepetition interest, avoidable under

§ 522 (f)(1)(A)?

Presently, there are two consensual liens against the property, totaling $122,305.00.[30] There is thus no equity in the property, at an $85,000 value as scheduled

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[28] As held by the Court, 99.1 I.B.C.R. 7, the exemption is valid as against the Trustee through "exemption by default" given the lack of timely objection.

[29] Lien avoidance is not strictly at issue in the instant submission, which addresses only the § 524 injunction and validity of the Judgment, and the validity of the homestead exemption. However, discussion of certain aspects of the lien avoidance issue may be of benefit in moving the case forward.

[30] Under Fed.R.Bankr.P. 3001(f), claims are prima facie evidence of amount and validity of claims, and the Court thus uses the figures contained in these two creditors' filed claims for purposes of this discussion. However, given the value of the property according to Debtor's schedules ($85,000), even the face amount of the consensual secured claims

(continued...)

by Debtor, to which either the homestead or the judgment lien would attach. However, *In re Higgins*, 201 B.R. 965, 967 (9th Cir. BAP 1996) indicates that impairment exists and a lien may be avoided even if a debtor has no equity in the property. *See also*, *In re Toplitzky*, 227 B.R. 300, 303-304 (9th Cir. BAP 1998) (citing *Higgins* and legislative history.)

The determination of "impairment" has been simplified by the amendments to § 522(f) which require a formulaic approach. Section 522(f) now provides:

> (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of –
>
> (i) the lien;
> (ii) all other liens on the property; and
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

§ 522(f)(2)(A). The intent of the amendment was to provide a simple arithmetic test to determine whether a lien impairs the exemption. *Bank of America National Trust and Savings Assn., v. Hanger (In re Hanger)*, 217 B.R. 592, 594-95 (9th Cir. BAP 1997), aff'd 1999 WL 1054904 (9th Cir. 1999).

The process of avoidance simply requires the parties to insert into the formula the property value ($85,000 under the schedules), the consensual liens ($122,305 per the proofs of claim), Creditors' lien ($71,942.78 plus interest under state law to the date of petition), and Debtor's homestead in the absence of liens ($50,000). When this is done, it

[30](...continued)
($90,250) would lead to similar results under the § 522(f) formula discussed below.

appears to the Court that the existence of the claims of Debtor's parents and in-laws is of paramount importance in determining whether any portion of Creditors' lien survives.[31]

Thus, while the two issues presented, as to the survivability of the lien in light of the prior discharge and the validity of the homestead, have been determined, the question of lien avoidance under § 522(f) and the treatment of Creditors' claim in the chapter 13 as a secured or unsecured claim must await resolution of the adversary proceeding.

CONCLUSION AND ORDER

For the foregoing reasons, the Court concludes that a portion of Creditors' Judgment reflects claims which were discharged through the 1993 chapter 7 case. Creditors' Judgment and lien are valid to the extent of $71,942.78 plus interest thereon, and is void as to all other amounts.

All injunctive aspects of the state court rulings remain valid, unaffected by the discharge, and binding on Debtor.

Debtor's homestead exemption is valid based upon the declaration of March 25, 1993.

Creditors' judgment lien would appear avoidable under § 522(f) to the extent it impairs the exemption. A determination of this issue must await further developments in the adversary proceeding and chapter 13 case.

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[31] It presently appears that, in order for the lien to survive a § 522(f)(1)(A) motion on the basis that it does not impair the exemption, the parents' and in-laws' claims must not just be subordinated in priority to Creditors' lien, but that they no longer be entitled to treatment as allowed secured claims. The Court appreciates that the subordination action, as presently styled, seeks only to elevate the priority of the judgment lien of Creditors ahead of the mortgage claims of Debtor's relatives. *See* Complaint at p. 3-4. As such, the liens of the relatives would continue to exist against the property.

Dated this 10th day of December, 1999.